(1)

Supreme Court, U.S.
FILED

96 230 AUG 1 2 1995

OFFICE OF THE CLERK

No.____

IN THE

Supreme Court of the United States

OCTOBER TERM 1996

HANCOCK ELECTRONICS CORPORATION,

Petitioner,

v.

WASHINGTON METROPOLITON AREA TRANSIT AUTHORITY,

Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Thomas B. Smith
Counsel of Record
ROPES & GRAY
1301 K Street, N.W.
Suite 800 East
Washington, D.C. 20005
(202) 626-3900

Attorneys for Petitioner

Balmar Legal Publishing Department, Washington, D.C. (202) 682-9800

34 pp

QUESTIONS PRESENTED

Did the court of appeals commit error when it barred the petitioner from litigating its claim in district court, based on the government contracts law doctrine known as "constructive termination for convenience," when the contracting authority breached the parties' contract not by terminating it, but by demanding materially different performance by the contractor?

Did the court of appeals commit error when it conclusively adjudicated the parties' dispute on the merits, when the only question presented on appeal was whether there was jurisdiction in the district court to hear the petitioner's claims?

RULE 29.6 DISCLOSURE

Petitioner Hancock Electronics Corporation ("Hancock") is owned and operated by Joyce L. Sturdy of Hingham, Massachusetts. Hancock is not owned either in whole or in part by any other corporate entity, nor does Hancock own any subsidiary either in whole or in part. Hancock has no affiliates that have issued shares to the public.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

RULE 29.6 DISCLOSURE ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

REASONS IN FAVOR OF GRANTING THE PETITION 8

I. The Court Of Appeals Erred In Applying The Doctrine Of Constructive Termination For Convenience To This Case 9

II. The Court Of Appeals Erred By Conclusively Deciding The Central Issue Of Cardinal Change 11

CONCLUSION 14

TABLE OF AUTHORITIES

College Point Boat Corp. v. United States, 267 U.S. 12 (1925) 8, 9, 10

Erwin v. United States, 19 Cl. Ct. 47 (1989) 9

G.C. Casebolt Co. v. United States, 421 F.2d 710 (Ct. Cl. 1970) 9

General Builders Supply Co. v. United States, 409 F.2d 246 (Ct. Cl. 1969) 9

Jenkins v. McKeithen, 395 U.S. 411 (1969).....12

John Reiner & Co. v. United States, 325 F.2d 438 (Ct. Cl. 1963) 9

Klockner-Pentaplast of America, Inc. v. Roth Display Corp., 860 F. Supp. 1119 (W.D. Va. 1994) 14

Maxima Corp. v. United States, 847 F.2d 1549 (Fed. Cir. 1988) 10

Nichols v. G.D. Searle & Co., 783 F. Supp. 233 (D. Md. 1992) 14

Sanders Associates, Inc. v. United States, 423 F.2d 291 (Ct. Cl. 1970) 10

Torncello v. United States, 681 F.2d 756 (Ct. Cl. 1982) 9

Trandes Corp. v. Guy F. Atkinson Co., 996 F.2d 655 (4th Cir. 1992) 13

United States v. Utah Construction & Mining Co., 384 U.S. 394 (1966) 5, 13

Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc., 797 F.2d 1222 (3d Cir. 1986) 13

Zinsler v. Marriott Corp., 605 F. Supp. 1499 (D. Md. 1985) 14

Federal Acquisition Regulation 27.401 (48 C.F.R. Ch.1 §27.401) 13

No.____

IN THE

Supreme Court of the United States

OCTOBER TERM 1996

HANCOCK ELECTRONICS CORPORATION,

Petitioner,

v.

WASHINGTON METROPOLITON AREA TRANSIT AUTHORITY,

Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Hancock Electronics Corporation hereby petitions the Court to issue a Writ of Certiorari to review the April 16, 1996 judgment and opinion of the United States Court of Appeals for the Fourth Circuit in this matter.

OPINIONS BELOW

The opinion of the court of appeals is reported at 81 F.3d 451 (4th Cir. 1996), and is reproduced at Petitioner's Appendix ("Pet. App.") 1a. The underlying district court rulings are unpublished, and are reproduced at Pet. App. 7a and Pet. App. 9a.

JURISDICTION

The court of appeals entered judgment on April 16, 1996, and denied petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc on May 13, 1996. Pet. App. 13a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The petitioner, Hancock Electronics Corporation ("Hancock"), sued the respondent, Washington Metropolitan Area Transit Authority ("WMATA"), in United States District Court for the Eastern District of Virginia to recover damages resulting from a breach of contract by WMATA. WMATA moved to dismiss Hancock's complaint under Fed. R. Civ. P. 12(b)(6), arguing that Hancock was not entitled to bring its case in federal court, and was instead required to litigate its claim before the Board of Contract Appeals, an administrative tribunal. The district court initially denied that motion, and then granted it on a motion for reconsideration by WMATA.

The Fourth Circuit was presented with one threshold issue for review: Was the district court correct in dismissing the case and sending Hancock to the Board of Contract Appeals, or was Hancock entitled to litigate its claim in federal court? The court of appeals was not presented with the merits of the parties' dispute, which were fact-dependent and the subject of ongoing discovery.

In affirming the district court, the Fourth Circuit held that the breach of contract by WMATA was a "constructive termination for convenience," and had to be litigated before the Board of Contract Appeals. The court also conclusively adjudicated the central factual issue in this case -- whether the breach committed by WMATA amounted to a "cardinal change" to the parties' contract. The court ruled against Hancock on this issue by accepting factual defenses asserted by

WMATA that were inconsistent with the allegations in Hancock's complaint.

The effect of the court's ruling, that WMATA's breach was not a cardinal change, was to deny Hancock the opportunity to *ever* apply for *any* relief in *any* forum, including the Board of Contract Appeals. Without a forum in which to litigate its claim against WMATA, Hancock has no ability to recover for that breach, and will probably go bankrupt.

If Hancock does go out of business, the country will lose its last American-owned designer and manufacturer of mass transit brake systems, and the only company of its kind in the world that is owned and operated by a woman.

STATEMENT OF FACTS

The Contract

As alleged in the complaint, the contract in this case required Hancock to manufacture and deliver to WMATA certain brake system components that WMATA could install on its rapid transit rail cars. App. 4-6.[1] The contract did not require Hancock to deliver to WMATA any proprietary schematic drawings or computer software documentation pertaining to Hancock's brake system designs. App. 6.

The contract provided that WMATA could unilaterally make certain changes in the performance required of Hancock under the contract, as long as those changes were within the general scope of the contract. Permissible changes were identified in the "changes clause" of the contract, and included modifications in design specifications, place of delivery, quantities to be delivered, and place of inspection. App. Ex. 87.[2] Under the "disputes clause" of the contract, any

---

[1] References to "App." are to the Joint Appendix filed with the court of appeals.

[2] References to "App. Ex." are to the Exhibits to the Joint Appendix filed with the court of appeals.

disagreement about the amount Hancock should be paid for changes ordered under the "changes clause" was to be resolved by the Board of Contract Appeals. App. Ex. 90.

The contract also contained a "termination for convenience" clause, which permitted WMATA to terminate Hancock's performance under the contract whenever it determined that such a termination would be in its own best interest. Upon such a termination, Hancock could submit a claim to WMATA for quantum meruit damages resulting from the termination, and, if a dispute arose over how much was due, it too was to be resolved before the Board of Contract Appeals. App. Ex. 91.

The Breach

Hancock's complaint alleged that WMATA breached the parties' contract in April 1995, when it demanded that Hancock give to WMATA, in addition to the brake equipment that *was* specified for delivery in the contract, rights to certain sophisticated technical data relating to Hancock's proprietary brake system design that *was not* specified for delivery in the contract. App. 7-10. The complaint further alleged that WMATA breached the contract by demanding that Hancock also give that confidential data to a third party for a purpose that was not within the scope of the contract, and by requiring Hancock to give that third party any and all *additional* data relating to Hancock's proprietary braking technology that the third party requested. App. 9-10.[3]

---

[3] The third party was Battelle Corp., with whom WMATA had *independently* contracted to perform a "failure modes and effects analysis" (a "FMEA") on the brakes to be manufactured by Hancock. That contract was entered into *six months after* the Hancock contract was begun, did not include Hancock as a party, and was *separate from and additional to* the testing required under the contract. App. Ex. 88, 161-63. Moreover, it was only when the Battelle contract was issued that WMATA decided it needed what it had not previously wanted or agreed to pay for in Hancock's contract -- Hancock's confidential design data. App. 6-7.

The Litigation

After considering these extracontractual demands, and determining that they were impermissible under the changes clause, Hancock suspended its performance under the contract and sued WMATA for breach in district court. In its complaint, Hancock asserted that WMATA's demands extended beyond the scope of the contract, amounted to a "cardinal change" to the contract, were not remediable under the disputes clauses of the contract, and were actionable in court. App. 3-4, 11. *See United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 405, 412 (1966) (cardinal changes actionable in court). Jurisdiction for the case was based on sections 80 and 81 of Public Law 89-774, 80 Stat. 1350.

On the day the complaint was filed, however, WMATA wrote to Hancock and directed it to continue performing under the contract. Supp. App. 49.[4] That letter was followed by another sent four days later, after Hancock's complaint had been served, in which WMATA again demanded that Hancock turn over its proprietary data, and explicitly informed Hancock that WMATA had *not* terminated the contract. Supp. App. 100.

Hancock refused to comply with WMATA's demands, and proceeded to litigate its claim in court. One month later, with the litigation well underway, WMATA again wrote to Hancock stating that because Hancock had refused to deliver the requested data, WMATA was terminating the contract for default. Supp. App. 52-53.

WMATA then moved to dismiss Hancock's complaint under Fed. R. Civ. P. 12(b)(6), arguing that Hancock could only seek relief for its breach from the Board of Contract Appeals. The district court initially denied WMATA's motion from the bench, holding that

---

[4] References to "Supp. App." are to the Supplemental Appendix filed with the court of appeals.

> [T]here is a decent argument that there was a cardinal change to the terms and conditions of the contract or at least that that's an issue that needs to be resolved, and I am uncomfortable in denying the plaintiff the forum of the Federal Court and requiring them to go through the disputes portion of the contract; because, if that decision is correct, that is that there was a material or cardinal change to the conditions of the contract, then the disputes clause would not be the appropriate way for resolving the dispute. So, I am denying the motion to dismiss.

Pet. App. 8a.

WMATA moved for reconsideration, this time arguing that even if its demands for Hancock's data *had* amounted to a cardinal change, Hancock was *still* barred from federal court, and limited to the Board of Contract Appeals, by virtue of a doctrine called "constructive termination for convenience." According to WMATA, that doctrine converted any breach by WMATA into a termination for its convenience, thereby requiring an administrative resolution instead of a judicial one.

The district court granted WMATA's motion for reconsideration, reversed its earlier ruling, and dismissed Hancock's Complaint. The court reasoned that

> [F]or the sake of argument . . . let us assume that [Hancock] show[ed] the breach. . . . [L]et us assume that the way in which [Hancock is] interpreting the contract and the obligations under the contract in terms of turning over this proprietary information, let's assume that . . . it was a cardinal change and that [WMATA was] wrong in asking for it. . . . [B]ut, as I understand the argument that the defendants are making is that it doesn't make any difference. If there is a breach . . . then the concept that contracts of this kind that have the constructive termination for convenience . . . throw this case right

> back . . . into the administrative process. . . . [So] giving you, for the sake of argument, that you proved your breach, the best you can get is what you are going to get out of the administrative process. I think that is appropriate. . . . I am going to go ahead and dismiss the case.

Pet. App. 10a. The court was careful, however, to limit its holding to the issue of jurisdiction only, so that neither party would be prejudiced in their litigation before the administrative tribunal:

> I am simply saying that this Court at this point doesn't have jurisdiction to hear this case, because the language of the contract and the constructive-termination-for-convenience clause throws it into the Board of Contract Appeals, whatever the procedure, the administrative procedure is within the contract.
>
> And then under the APA and the various rights that you have under the APA, there is certainly appellate review ultimately at some point in the District Court or the Court of Appeals for the Fourth Circuit down the road, *but we are not, you are not at that point yet.*
>
> You may prevail very well before the administrative body, and you also may resolve your dispute before you can get to that point, but I am comfortable now that under the facts of this case, this case should be dismissed and I am entering the order.

Pet. App. 11a (emphasis added).

Hancock appealed to the Fourth Circuit pursuant to 28 U.S.C. § 1291. In the court of appeals, the only question presented for review was whether Hancock could litigate its claim in federal court.

In affirming the district court, the court or appeals first held that "whether WMATA breaches or wrongfully terminates a contract, the event is treated as a constructive termination under the Termination for Convenience Clause." Pet. App. 4a-5a. The court then held that even if this rule did not apply to cardinal changes, Hancock was still relegated to the Board of Contract Appeals, because WMATA's breach was *not* a cardinal change. Pet. App. 6a.

Hancock petitioned the court for rehearing, and also sought a rehearing en banc. The court denied both petitions on May 13, 1996. Pet. App. 13a.

REASONS IN FAVOR OF GRANTING THE PETITION

The court of appeals held that the doctrine of constructive termination for convenience required that this litigation be conducted before the Board of Contract Appeals. That ruling conflicts with the Court's holding in *College Point Boat Corp. v. United States*, 267 U.S. 12, 15-16 (1925), which established the constructive termination for convenience doctrine. Under *College Point Boat*, where the government intentionally *terminates* a contract by *ceasing* or *reducing* a contractor's performance under it, that termination may be considered to have been for the convenience of the government. Yet that doctrine does not apply in the *absence* of such a termination, and cannot apply where the government commits a breach by demanding *additional* deliverables under under the contract, instead of fewer. 267 U.S. at 16.

The court of appeals also reached beyond the jurisdictional issue presented in this case to decide the parties' dispute on the merits. The court's ruling was an extreme departure from the accepted and usual course of judicial proceedings, has effectively left Hancock without a remedy -- or a forum in which to seek one -- and calls for the exercise of the Court's supervisory power.

I. The *Court Of Appeals Erred In Applying The Doctrine* Of Constructive Termination For Convenience To This Case

The court of appeals held that "[u]nder settled law, whether WMATA breaches or wrongfully terminates a contract, the event is treated as a constructive termination under the Termination for Convenience Clause." Pet. App. 5a. The ruling was in error and conflicts with the holding in *College Point Boat*, 267 U.S at 15-16.

The doctrine of constructive termination for convenience applies in "situations where the government stops or curtails a contractor's performance for reasons that are later found to be questionable or invalid." *Erwin v. United States*, 19 Cl. Ct. 47, 53 (1989). *See also College Point Boat*, 267 U.S. at 15-16; *Torncello v. United States*, 681 F.2d 756, 759 (Ct. Cl. 1982). Under these circumstances, "a Government directive to end performance of the work will not be considered a breach but rather a convenience termination . . . even though the contracting officer wrongly calls it a cancellation, mistakenly deems the contract illegal, or erroneously thinks that he can terminate the work on some other ground." *G.C. Casebolt Co. v. United States*, 421 F.2d 710, 712 (Ct. Cl. 1970).

Before there can be a constructive termination for convenience, however, there must be a *termination. College Point Boat*, 267 U.S. at 15-16. For example, in *General Builders Supply Co. v. United States*, 409 F.2d 246 (Ct. Cl. 1969), a case cited by the court of appeals, there was such a termination -- a default imposed by the government that was later held to be wrongful -- which the court converted into a termination for convenience. *Id.* at 251. Other types of deliberate, but ultimately erroneous, terminations also have been converted into constructive terminations for convenience. *E.g. John Reiner & Co. v. United States*, 325 F.2d 438, 439, 442-43 (Ct. Cl. 1963) (improper cancellation), *cert. denied*, 377 U.S. 931 (1964).

Yet no case has ever held what the court of appeals held below: that the government's breach based on a demand for *additional* performance, not *less*, amounts to a termination, and that the government's express and unequivocal instruction to a contractor that its contract has *not* been terminated means exactly the opposite.

Hancock's claim here is that WMATA breached the contract by requiring Hancock to deliver more material than was contemplated in the contract, which demands were beyond the scope of the contract, and were fundamentally at odds with its terms. Up through the date this case was filed -- and for some time thereafter -- WMATA did not terminate, cancel, or rescind Hancock's contract, or otherwise refuse to order brake equipment under it. *See* App. 10-11. Instead, WMATA's actions belied precisely the opposite goal: to obtain Hancock's data, and for Hancock to *continue performing* under the contract.

In fact, four days after Hancock filed suit, WMATA's Contracting Officer wrote to Hancock to reiterate its demand for Hancock's data, and to underscore that WMATA did not consider or intend the contract to be at an end:

> *I am informing you that your contract has not been terminated.* . . . [Y]ou are required to provide . . . technical data and software documentation. . . . You are obligated under the terms of the contract to perform by providing this data.

Supp. App. 100 (emphasis added).

Under the doctrine of constructive termination for convenience, "it [is] the justification that [is] retroactive, not the termination." *Maxima Corp. v. United States*, 847 F.2d 1549, 1553 (Fed. Cir. 1988) (citing and quoting *College Point Boat*, 267 U.S. at 15-16). Where there is no affirmative act of termination, there is no termination to retroactively construe as having been for the government's convenience. *See Sanders Associates, Inc. v. United States*, 423 F.2d 291, 295-96 (Ct.

Cl. 1970) (doctrine not applied, and plaintiff not required to resort to administrative procedures, because defendant, "throughout the performance of the contract, *never once gave any indication that it considered the Letter Contract terminated.* In fact, defendant, if anything, encouraged plaintiff to continue performance.") (emphasis in original).

The ruling of the court of appeals, invoking the doctrine of constructive termination for convenience to dismiss this action, was erroneous and should be reviewed by this Court.

II. The Court Of Appeals Erred By Conclusively Deciding The Central Issue Of Cardinal Change

In dismissing Hancock's complaint, the district court assumed that Hancock had shown, and could prove, that the actions WMATA had taken amounted to a cardinal change to the contract. Pet. App. 10a. According to the district court, even breaches that are cardinal changes constructively invoke the contract's termination for convenience provision and limit Hancock to the remedies available from the Board of Contract Appeals. Pet. App. 10a-11a.

Thus the district court's ruling left just one issue for appellate review: Did the doctrine of constructive termination for convenience deny Hancock a federal forum to litigate its claims? It was not necessary for the court of appeals to reach or decide the issue of whether WMATA's actions actually *did* constitute a cardinal change to the contract.

The court of appeals reached out to decide this issue, however, and conclusively held that "WMATA's demand did not amount to a *cardinal* change to the contract." Pet. App. 6a (emphasis in original).

By holding that WMATA's breach was not a cardinal change, the court of appeals effectively denied Hancock the right to seek relief in *any* forum, including the Board of Contract Appeals. That is so because a *final determination* that the changes WMATA ordered were not "cardinal" changes

(but were instead just "ordinary" changes) means that, under the changes clause, Hancock was required to accept those changes and continue performing under the contract, instead of rejecting those changes and suspending its performance. A *final determination* on cardinal change thus gives rise to a claim against *Hancock* for breach, and denies it the ability to press its breach claim against WMATA in any forum. The court's ruling on this issue, therefore, effectively put Hancock out of court, and likely out of business.

The court decided this issue without the benefit of a final lower court determination on the issue, and before the parties had even finished discovery on it. The court's opinion also accepted as proven certain factual defenses asserted by WMATA, which defenses conflicted with the allegations in Hancock's complaint. This too was error. *See Jenkins v. McKeithen,* 395 U.S. 411, 421-422 (1969).

For example, the court held that "the entire dispute between WMATA and Hancock reduces to whether Hancock was required to turn over work it had already completed. No one claims that Hancock had to perform extra work or develop new information to comply with WMATA's request." Pet. App. 6a. But Hancock's complaint made plain that WMATA had insisted that Hancock produce to nonparty Battelle Corp. *not only* the proprietary data Hancock had brought with it on the day scheduled for qualification tests, *but also* any additional data that Battelle later decided it needed to perform its subsequent FMEA on Hancock's brakes, including any data that Hancock *had not* created at that time. *See* App. 9-10; Supp. App. 65-66.

In addition, the court held that WMATA was entitled to test Hancock's brakes to make sure they qualified under the contract, that WMATA insisted that it needed Hancock's software to perform such tests, and that Hancock refused to let WMATA use that software. Pet. App. 6a. But the dispute in this case was not about Hancock's software, it was about

Hancock's software "*documentation*" -- including the *source code* that converted Hancock's proprietary process formulae, algorithms, and flow charts into computer language. Source code is *not* considered an element of software that is specified for delivery under a government contract. *See* App. 7-10; *see also* Federal Acquisition Regulation 27.401 (48 C.F.R. Ch.1 § 27.401).[5] Even the suggestion that WMATA needed Hancock's software documentation for qualification tests under the contract, as opposed to the separate FMEA by Battelle, conflicts with the allegations in Hancock's complaint. *See* App. 6-10.

These issues were central to Hancock's case on the merits. The court of appeals' cursory and conclusory treatment of them underscores why a final decision on the question of cardinal change was neither presented nor appropriate at this stage in the litigation.

It is true that the issue of cardinal change is a relevant threshold consideration, given that disputes about everyday "non-cardinal" changes are to be resolved before the Board of Contract Appeals, and not in court. *See Utah Construction*, 384 U.S. at 412. But any ruling on the jurisdiction issue should have been *limited* to the jurisdiction issue, and should not have been a final determination on the issue of cardinal change. In fact, this is precisely how the district court addressed the issue of cardinal change when it initially denied WMATA's motion to dismiss. *See* Pet. App. 8a. It is also how the district court addressed the jurisdiction issue on re-

---

[5] The technical distinction is explained in *Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc.*, 797 F.2d 1222, 1229-1231 (3d Cir. 1986) *cert. denied*, 479 U.S. 1031 (1987). *See also Trandes Corp. v. Guy F. Atkinson Co.*, 996 F.2d 655, 662-63 (4th Cir. 1992), *cert. denied*, 114 S. Ct. 443 (1993).

consideration, when it ruled that Hancock's claim was barred from federal court after all. *See* Pet. App. 11a.[6]

The court of appeals' ruling was not so limited or carefully tailored. The prejudice to Hancock is immense. The final determination of the court of appeals that WMATA's breach was not a cardinal change was erroneous and should be reviewed by this Court.

CONCLUSION

For all the foregoing reasons, Hancock Electronics Corporation respectfully requests that its Petition for Writ of Certiorari be granted.

Respectfully submitted,

Thomas B. Smith
Counsel of Record
ROPES & GRAY
1301 K Street, N.W.
Suite 800 East
Washington, D.C. 20005
(202) 626-3900

Attorneys for Petitioner

Dated: August 12, 1996

---

[6] As a general rule, courts must be careful to limit their rulings on jurisdictional questions when the "determination of factual disputes central to the assertion of jurisdiction may be dispositive of questions of liability as well." *Nichols v. G.D. Searle & Co.*, 783 F. Supp. 233, 243 (D. Md. 1992). *See also Klockner-Pentaplast of America, Inc. v. Roth Display Corp.*, 860 F. Supp. 1119, 1122 (W.D. Va. 1994); *Zinsler v. Marriott Corp.*, 605 F. Supp. 1499, 1502-03 (D. Md. 1985).

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 95-2159

HANCOCK ELECTRONICS CORPORATION,

Plaintiff-Appellant,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Defendant-Appellee.

No. 95-2920

HANCOCK ELECTRONICS CORPORATION,

Plaintiff-Appellant,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Defendant-Appellee.

Appeals from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Claude M. Hilton and Leonie M. Brinkema, District Judges.
(CA-95-626-A)

Argued: December 7, 1995
Decided: April 16, 1996

Before WILKINSON, Chief Judge, and RUSSELL and NIEMEYER, Circuit Judges.

NIEMEYER, Circuit Judge:

Hancock Electronics Corporation, a Massachusetts company, filed suit in May 1995 against Washington Metropolitan Area Transit Authority (WMATA) for damages resulting from an alleged breach of contract. The district court dismissed the action without prejudice on the ground that Hancock had failed to exhaust its contractually prescribed administrative remedies. We affirm.

I

WMATA, a quasi-governmental agency created by an interstate compact and approved by Congress to provide a rapid transit system for the Washington, D.C., metropolitan area, awarded Hancock a contract in spring 1994 to provide replacement braking systems for approximately 300 rail cars. The contract obligated Hancock to design, manufacture, and install the braking systems, which contain both mechanical and electronic components. The contract also required Hancock to demonstrate its contract performance to WMATA through testing and to provide WMATA with certain technical data about the systems.

WMATA contends that it does not possess the equipment or experience to monitor testing of the systems' software and, consequently, that it was required to subcontract that function to a third party. Shortly before the scheduled testing of the brake systems in April 1995, WMATA wrote to Hancock, "You are kindly reminded that Hancock Electronics can not [sic] start qualification testing unless the technical documentation requested in the Reference is received and reviewed." Less than a week later, WMATA again advised Hancock that qualification testing "will not be permitted" until Hancock submits "all technical data including software to WMATA." WMATA also demanded Hancock's permission to provide the technical data to a third party to determine "whether the data is sufficient and complete for a Failure

Modes and Effects Analysis." At WMATA's request, the third party agreed to enter into a lifetime nondisclosure agreement with Hancock to protect Hancock's proprietary information, and WMATA's contracting officer averred in his affidavit that Hancock had consented, during a telephone conversation on April 7, 1995, "to disclose the technical data and software documentation to [the third party] provided that [the third party] entered into a lifetime nondisclosure agreement."

Hancock, however, responded that its technical data and software are proprietary and that its contract with WMATA does not provide for their disclosure either to WMATA or to a third party. It further claimed that WMATA's insistence that the data and software be provided before Hancock conducted contractually required qualification testing constituted a breach of their contract. On May 11, 1995, Hancock notified WMATA by letter that WMATA's breach prevented and excused Hancock's further performance of the contract and, therefore, that Hancock was treating the contract as terminated. That same day, Hancock filed suit against WMATA in the district court for breach of contract, demanding more than $2 million in damages.

WMATA thereafter informed Hancock that WMATA was terminating the contract pursuant to the contract's Default Clause, contending that Hancock's May 11 letter, its lawsuit, its cancellation of a subcontract, and its "failure to deliver the technical data as of June 15, 1995 . . . constitute a repudiation and abandonment of all work under the contract." WMATA's contracting officer stated that his decision was a "Final Decision . . . appealable under the Disputes Clause of the contract." WMATA also filed a motion to dismiss Hancock's complaint on the ground that Hancock had not exhausted its contractually prescribed administrative remedies.

Following a hearing, the district court granted WMATA's motion to dismiss Hancock's complaint without prejudice. The court concluded that even if WMATA had

breached the contract, the contract's "termination for convenience" provision limited WMATA's liability and required Hancock to avail itself of the specified administrative procedures. This appeal followed.

II

The contract between the parties in this case is a standard government contract containing a Disputes Clause, a Default Clause, and Termination for Convenience Clause. The Disputes Clause states that "[e]xcept as otherwise provided . . . any dispute concerning a question of fact arising under this Contract which is not disposed of by agreement shall be decided by the Contracting Officer." The Clause gives Hancock the right to appeal to WMATA's Board of Directors or its authorized representative, which in this case is the Army Corps of Engineers Board of Contract Appeals. Ultimately, decisions resolving factual disputes under the contract are reviewable by the courts under a deferential standard.

The Default Clause permits WMATA to declare the contractor in default and sets forth the procedures that the parties must follow when a default has been declared. If the parties are unable to agree on a resolution, the Clause provides that their disagreement shall constitute "a dispute concerning a question of fact within the meaning of the DISPUTES article of this Contract."

Finally, the Termination for Convenience Clause confers upon WMATA the option of terminating the contract "whenever the Contracting Officer shall determine that such termination is in the best interest of [WMATA]." The Clause provides for a quantum meruit adjustment for performance already rendered by the contractor. Again, any disputes about the parties' disengagement under the Termination for Convenience Clause are to be resolved according to the Disputes Clause.

Under settled law, whether WMATA breaches or wrongfully terminates a contract, the event is treated as a construc-

tive termination under the Termination for Convenience Clause. *See, e.g., General Builders Supply Co. v. United States*, 409 F.2d 246, 249 (Ct. Cl. 1969). The law thus recognizes that, in entering into a contract, the government limits its potential liability to the value of the performance rendered at the time it terminates the contract for convenience. The combination of Termination for Convenience, Default, and Dispute Clauses in Hancock's contract with WMATA provides in essence that upon WMATA's default, Hancock is entitled to its quantum meruit performance under the contract but not its anticipated profits. *See generally* Ralph C. Nash, Jr. & John Cibinic, Jr., *Federal Procurement Law* 1104, 1124 (3d ed. 1980). The principle is unique to government contracts and well understood by parties entering into such contracts.

III

Hancock does not take issue with these generally established tenets of government contract law. Rather, it seeks to invoke an exception that applies when a government agency effects a cardinal change to a government contract, thereby nullifying the contract and denying the government agency the privilege of relying on any of the contract's dispute resolution provisions. A cardinal change occurs—and subjects the government to a suit for damages in court—when the government demands a contractual alteration "so drastic that it effectively requires the contractor to perform duties materially different from those originally bargained for." *Allied Materials & Equip. Co. v. United States*, 569 F.2d 562, 563-64 (Ct. Cl. 1978) (per curiam).

In this case, WMATA's demands, even if not covered by the contract, did not effect a cardinal change to the contract so as to nullify the contract's dispute resolution mechanisms. The electronic aspects of Hancock's replacement brakes had to be tested, and WMATA was entitled under the contract to determine whether they qualified. Because the brakes con-

tained, as one of their specified components, a complex electronic system, WMATA insisted that it needed the electronic software to understand whether its tests qualified the brakes. Whether or not the contract requires Hancock to release its proprietary software, Hancock had already created the software in the course of performing the contract and acknowledged, as the tests were about to begin, that it had the software with it. Hancock simply would not permit WMATA to use the software, particularly when that use would involve a third party's assistance.

Thus, the entire dispute between WMATA and Hancock reduces to whether Hancock was required to turn over work it had already completed. No one claims that Hancock had to perform extra work or develop new information to comply with WMATA's request. While the contract explicitly provides for the production of certain technical data, whether software and design data fall within that requirement is not clear. What is clear, however, is that WMATA's demand did not amount to a *cardinal* change to the contract. This dispute is typical of those intended to be resolved through the administrative process that the parties consented to by contract.

Accordingly, we affirm the district court's dismissal of Hancock's complaint without prejudice. In so doing, we express no view on the merits of the parties' underlying dispute. Our decision renders moot Hancock's appeal from the district court's denial of its motion for a preliminary injunction.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CIVIL ACTION
NO. 95-626-A

HANCOCK ELECTRONICS CORPORATION,

Plaintiff,

vs.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Defendant.

Friday, September 1, 1995

Transcript of motion proceedings in the above-captioned matter.

BEFORE:

The Honorable LEONIE M. BRINKEMA, Judge,
United States District Court

THE CLERK: Civil Action No. 95-626-A, Hancock Electronics Corporation vs. Washington Metropolitan Area Transit Authority. . . .

THE COURT: . . . I understand the basic issue before the Court is whether or not the plaintiff can bring a lawsuit in this court . . . or whether it must go through administrative proceedings to do that. . . .

I think that there is a real dispute about that. I don't think that's an easy -- that's not a foregone conclusion. . . .

The way [the] contract reads is that [WMATA] won't divulge technical data without the permission of the other side.

Well, the other side, as I understand their pleadings, are saying here basically, this is so proprietary we don't want you disclosing it, so you have caught yourself in a bind.

What your contract, it seems to me, should have then said is for testing purposes it will be disclosed or something like that, but that's not what you have got. . . .

I think there is a decent argument that there was a cardinal change to the terms and conditions of the contract or at least that that's an issue that needs to be resolved, and I am uncomfortable in denying the plaintiff the forum of the Federal Court and requiring them to go through the disputes portion of the contract; because, if that decision is correct, that is that there was a material or cardinal change to the conditions of the contract, then the disputes clause would not be the appropriate way for resolving the dispute.

So I am denying the notion to dismiss.

(Whereupon, the proceedings in the above-captioned matter were concluded.)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CIVIL ACTION
NO. 95-626-A

HANCOCK ELECTRONICS CORPORATION,

Plaintiff,

vs.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Defendant.

Friday, October 13, 1995

Transcript of motion proceedings in the above-captioned matter.

BEFORE:

The Honorable LEONIE M. BRINKEMA, Judge,
United States District Court

THE CLERK: Civil Action No. 95-626-A, Hancock Electronics Corporation vs. Washington Metropolitan Area Transit Authority. . . .

THE COURT: . . . [M]y memory of the last time this case was before me was we -- certainly I know I did not focus on the constructive-termination-for-convenience concept. The approach that I took was whether or not the issues about which you are complaining fell within performance of the contract or contract interpretation.

But for the sake of argument, as I understand the position now of WMATA, is that let us assume that you show the breach. In other words, let us assume that the way in which you are interpreting the contract and the obligations under the contract in terms of turning over this proprietary information, let's assume that, you know, it was a cardinal change and that they were wrong in asking for it. Assume all that, and then you may have a breach of the contract.

But even -- as I understand with this argument is that the constructive-termination-for-convenience clause in effect trumps everything and sends this case back into the necessary administrative proceedings to figure out what, if any damages are appropriate.

. . . [A]s I understand the argument that the defendants are making . . . [if] there is a breach, if that is the ultimate outcome of the litigation and it says yes, WMATA, you breached, then the concept that contracts of this kind that have the constructive termination for convenience, because WMATA is a quasi-governmental agency, and the policy, the public policies behind that about limitations of governmental liability in these types of matters would throw this case right back, as I understand it, into the administrative process which was the basis for the original motion to dismiss in the first place. . . .

The way in which counsel has couched the argument now, this is, giving you, for the sake of argument, that you proved your breach, the best you can get is what you are going to get out of the administrative process. I think that is appropriate. . . .

I have seen these kinds of clauses in other contracts. My understanding of the way they operate is how counsel has described it.

So for those reasons, I am going to go ahead and reverse my earlier decision and grant the defendant's motion for re-

consideration of the Court's order and go ahead and enter the dismissal. . . .

I am simply saying that this Court at this point doesn't have jurisdiction to hear this case, because the language of the contract and the constructive-termination-for-convenience clause throws it into the Board of Contract Appeals, whatever the procedure, the administrative procedure is within the contract.

And then under the APA and the various rights that you have under the APA, there is certainly appellate review ultimately at some point in the District Court or the Court of Appeals for the Fourth Circuit down the road, but we are not, you are not at that point yet.

You may prevail very well before the administrative body, and you also may resolve your dispute before you can get to that point, but I am comfortable now that under the facts of this case, this case should be dismissed, and I am entering the order.

My order is simply going to say it's dismissed. . . .

(Whereupon, the proceedings in the above-captioned matter were concluded.)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DIVISION
ALEXANDRIA DIVISION

CIVIL ACTION
No. 95-626-A

HANCOCK ELECTRONICS CORP.

Plaintiff,

vs.

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY

Defendant.

ORDER

For the reasons stated in open court, Defendant's Motion to Reconsider Court's Order Denying Defendant's Motion to Dismiss is GRANTED, and it is hereby

ORDERED that the Complaint be and is DISMISSED.

The Clerk is directed to forward copies of this Order to counsel of record.

Entered this 13th day of October, 1995.

Leonie M. Brinkema
United States District Judge

Alexandria, Virginia

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-2159
CA-95-626-A

HANCOCK ELECTRONICS CORPORATION

Plaintiff-Appellant

v.

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY

Defendant-Appellee

No. 95-2920
CA-95-626-A

HANCOCK ELECTRONICS CORPORATION

Plaintiff-Appellant

v.

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY

Defendant-Appellee

Filed May 13, 1996

On Petition for Rehearing with Suggestion
for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

Bert M. Montague
CLERK

(2)

Supreme Court, U.S.
FILED
SEP 12 1996
CLERK

No. 96-230

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

HANCOCK ELECTRONICS CORPORATION,

Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY IN OPPOSITION

ROBERT L. POLK
General Counsel

CAROL B. O'KEEFFE
Principal Deputy
General Counsel
(Counsel of Record)

JOSEPH J. ZIMMERMAN
Assistant General Counsel

Counsel for Respondent,
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY
600 Fifth Street, N.W.
Washington, D.C. 20001

Washington, D.C. • THIEL PRESS • (202) 328-3206

32 pp

QUESTION PRESENTED

Whether the Court of Appeals correctly held that a government contractor must exercise the contractually specified administrative remedies for breach of its government contract and is thus limited, in any eventual recovery for such breach, to the relief afforded under such administrative remedies?

LISTING OF AFFILIATES PURSUANT TO RULE 29.1

Pursuant to Rule 29.1, Respondent Washington Metropolitan Area Transit Authority ("WMATA") states that it is an agency and instrumentality of Maryland, Virginia and the District of Columbia created by an interstate compact, as authorized by Congress. See, Pub. L. No. 89-774. WMATA operates a regional transportation system in the Washington, DC metropolitan area. As a government entity, WMATA does not have any parent corporation, affiliates or subsidiaries.

TABLE OF CONTENTS

QUESTION PRESENTED . . . . . (i)

LISTING OF AFFILIATES PURSUANT TO RULE 29.1 . . . . . (ii)

TABLE OF AUTHORITIES . . . . . (iv)

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 2

The Dispute 2

Litigation 5

ARGUMENT 8

A. There Is No Conflict Between the Circuit Court's Decision and Decisions By This Court. 8

B. Other Issues Proposed By Petitioner Should Not Be Reviewed. 14

CONCLUSION 16

TABLE OF AUTHORITIES

Allied Materials & Equip. Co., v. United States, 569 F. 2d 562, (Ct. Cl. 1978) (per curiam) . . . 15

College Point Boat Corp. v. United States, 267 U.S. 12 (1925) 8, 12

D. Moody & Co., Inc. v. United States, 5 Cl. Ct. 70 (1984) 14

General Builders Supply Co. v. United States, 409 F. 2d 246 (Ct. Cl. 1969) 7

Hancock Electronics Corp. v. WMATA, 81 F. 3d 451 (4th Cir. 1996) 8, 14

John Reiner & Company v. United States, 325 F. 2d 438 (Ct. Cl. 1963), cert. denied, 377 U.S. 931 (1964) 8, 12, 13

Kalvar Corporation v. United States, 543 F. 2d 1298, (Ct. Cl. 1976) . . . 9-11, 13, 15

Moses H. Cone Memorial Hospital v. Mercury Construction Co., 460 U.S. 1, 24-25 (1983) . . 13

Nolan Brothers Incorporated v. United States, 405 F. 2d 1250 (Ct. Cl. 1969) 9, 10

United States v. Anthony Grace & Sons Inc., 384 U.S. 424 (1966) 13

United States v. Utah Construction & Mining Co., 384 U.S. 394 (1966) 11, 12

STATEMENT OF THE CASE

Petitioner Hancock Electronics Corporation ("Hancock") entered into a contract with the Washington Metropolitan Area Transit Authority ("WMATA") to design and fabricate braking systems for use on WMATA passenger rail cars. That contract was accurately characterized by the Court of Appeals as a "standard government contract". Pet. App. 4a.[1] A dispute arose between these parties concerning Hancock's obligation to disclose technical materials reflecting the design and operation of the electronic controls for the braking system. Hancock initially agreed to provide these materials and delivered a portion of them. Supp. App. 12. Later, Hancock insisted that the contract did not require delivery of the technical materials, characterized WMATA's requests for those materials a breach of the contract, ceased its performance and sued for expectancy damages in the United States District Court for the Eastern District of Virginia. App. 7-11.

The WMATA/Hancock contract contained provisions, standard in WMATA and federal government contracts, establishing an administrative remedy for disputes. Pet. App. 4a. The District Court granted WMATA's Motion to Dismiss Hancock's Complaint pursuant to Fed. R. Civ. P. Rule 12(b)(6). Pet. App. 12a. WMATA argued that, under the circumstances, Hancock was obliged to

---

[1]References to "Pet. App." are to the Appendix to Hancock's Petition For Writ Of Certiorari. References to "Pet." are to the text of that Petition. The Joint Appendix and Supplemental Appendix filed with the Court of Appeals shall be referred to as "App." and "Supp. App.", respectively.

exercise the administrative remedies for redress provided in the parties' contract.

Applying this decades-old principle of government contracts law, the Fourth Circuit Court of Appeals affirmed the District Court's dismissal of Hancock's Complaint. It noted that the contract contained a standard "termination for convenience" clause. Pet. App. 4a. Under established law, any breach of the contract by the government, e.g., by WMATA, would automatically be converted into a termination for convenience by the government. The aggrieved party, e.g., Hancock, would be entitled to the quantum meruit damages specified in the termination for convenience clause, and such damages were to be assessed exclusively by reference to the administrative remedies specified in the contract. Pet. App. 5a.

STATEMENT OF FACTS

The Dispute

WMATA operates the Washington, DC area rapid transit rail system. It contracted with Hancock to design, fabricate and install braking systems for approximately three hundred passenger rail cars. These systems are complex electro-mechanical assemblies. They operate according to intricate electronic programs; e.g., the "brains" of the system, which translate commands from the operator and information from automatic sensing systems into appropriate actions of the mechanical braking components. Supp. App. 10. Because the lives of hundreds of passengers depend directly on the satisfactory performance of these

braking systems under all conceivable circumstances, safety testing of the equipment and its operating systems is an obvious priority for WMATA. This dispute centers around the requirements for safety testing the "brains" of the braking system, the electronic programming.

The electronic "software" governing operation of Hancock's braking systems would be written as a series of instructions in a "high-level" english-like format. Those instructions are then translated into binary-type commands which can received by machines. That translation from "english-like" instructions to binary, machine-readable commands is performed in several steps of greater detail. Supp. App. 11. In order to have an operating system one must compose all these levels of "software". The totality of the "software" composed for the Hancock braking system as well as schematic drawings of the circuitry used to route the instructions generated by that software is referred to as "computer software documentation" by Petitioner. Pet. 3.

Safety testing for computer programming is performed by what is know as a Failure Modes and Effects Analysis ("FMEA") test. In effect, in a FMEA test, the programming is asked to perform in an exhaustive series of conditions simulated on a supercomputer. To be properly performed, FMEA testing requires all levels of the programming to be tested, e.g., from general to specific. WMATA needed to have FMEA tests performed on Hancock's braking system software.

Performance of WMATA's contract with Hancock began in the summer of 1994. From the outset, WMATA

repeatedly told Hancock that the computer software documentation must be provided in order that the FMEA tests be completed in a timely manner. Hancock, orally and in writing, agreed to provide the documentation on many occasions. App. 50-51. In December 1994, Hancock actually delivered a portion of the software documentation to WMATA. Supp. App. 12. The necessary FMEA testing was a highly sophisticated undertaking to be performed by a specialized, third-party, testing firm. Hancock had agreed to deliver the software documentation to a third-party testing firm provided it received substantial, additional compensation for doing so. App. 59-62. WMATA declined to pay the additional demanded compensation, but was willing to negotiate concerning the terms. It directed Hancock to provide the documentation to the testing firm. The relationship deteriorated rapidly from that point.

In April 1994, Hancock representatives arrived in Washington, DC with, according to Hancock's Complaint, the software documentation and schematics, ready to begin qualification testing of their equipment. App. 9. Qualification testing is, essentially, a controlled field test of a complete braking system. It follows a preliminary, factory test of the equipment known as "first article testing". Qualification testing also represents a juncture in performance of the contract when payments to the contractor become due. Hancock refused to provide WMATA with the software documentation and schematics and WMATA refused to permit qualification testing as a consequence.

Litigation

Notwithstanding its many promises to provide the software documentation or its partial delivery of documentation in December 1994, Hancock characterized WMATA's requests to be provided with the remainder of the documentation as "extracontractual demands". On May 11, 1994, Hancock notified WMATA that these extracontractual demands amounted to a breach of contract which excused Hancock from further performance. Hancock filed suit in the District Court on the same day. App. 12. In the succeeding month, WMATA wrote to Hancock twice advising, among other things, that WMATA expected continued performance under the contract. Because performance was not resumed, WMATA notified Hancock that its Contract was being terminated for default on May 15, 1995. Supp. App. 100.

WMATA moved to dismiss the Complaint. The basic thrust of WMATA's arguments was that initial consideration of the parties' dispute was properly vested in the contractually-specified administrative forum, e.g., trial before the U.S. Army Corps of Engineers Board of Contract Appeals. Hancock responded that the nature of the breach of contract allegedly committed by WMATA, e.g., the demand for the remainder of the documentation, constituted a "cardinal change" to the contract and, accordingly, excused Hancock from its contractual duty to exercise its administrative remedies before resort to the District Court.

Argument to the District Court proceeded in two phases. Initially, the Court denied WMATA's motion.

Pet. App. 8a. Subsequently, in response to a motion for reconsideration of that initial decision, the complaint was dismissed. Pet. App. 10a-11a. In these arguments, the parties addressed two main issues. The first, and seminal, question concerned the legal effect of the "Termination for Convenience" clause in the parties' contract. WMATA argued that because the contract contained the termination for convenience clause, any breach of that contract, by WMATA, would, by operation of law, be converted into a termination of the contract for convenience, thereby entitling Hancock to the recovery computed under the termination for convenience provisions of the contract. The recovery permitted Hancock under the termination for convenience provisions of the contract, essentially a quantum meruit reimbursement of expenses and earned profits, could only be assessed under the administrative procedures specified in the Disputes provisions of the contract. If, as WMATA insisted, Hancock's recovery was governed by the law pertaining to the termination for convenience clause, Hancock's sole avenue for redress lay through the Board of Contract Appeals.

The second issue centered around the doctrine of "cardinal change". Hancock argued that WMATA's requests for the software documentation amounted to a "cardinal change" in the terms of its contract. The effect, Hancock insisted, of that cardinal change was to both breach the contract and to entitle Hancock to disregard the administrative remedies specified in the contract. WMATA denied that its actions amounted to a cardinal change in the contract. Moreover, WMATA disagreed with Hancock's suggestion that a "cardinal change" breach of contract constituted a

recognized exception to the settled law that all breaches of contract were to be converted into terminations for convenience in government contracts, like the WMATA/Hancock Contract, which contained termination for convenience clauses.

The District Court held that Hancock's Complaint was properly dismissed because, under the law respecting the constructive termination for convenience doctrine, Hancock's remedies were limited to those available before the Board of Contract Appeals as it implemented the termination for convenience provisions of the Contract. Pet. App. 10a-11a. Rather than filing its case before the Board of Contract Appeals, as the District Court invited it to do, Hancock appealed that decision to the Circuit Court. That Court applied long-established law in the government contracts field and affirmed the District Court. It held:

> Under settled law, whether WMATA breaches or wrongfully terminates a contract, the event is treated as a constructive termination under the Termination for Convenience Clause. See, e.g., General Builders Supply Co. v. United States, 409F. 2f 246,249 (Ct. Cl. 1969). The law thus recognizes that, in entering into a contract, the government limits its potential liability to the value of the performance rendered at the time it terminates the contract for convenience. The combination of the Termination for Convenience, Default, and Dispute Clauses in Hancock's contract with

> WMATA provides, in essence, that upon WMATA's default, Hancock is entitled to its quantum meruit performance under the contract but not its anticipated profits. See generally, C. Nash Jr. & John Cibinic Jr., Federal Procurement Law 1104,1124 (3d ed. 1980). The principle is unique to government contracts and well understood by parties entering into such contracts.

Hancock Electronics Corp. v. WMATA, 81 F. 3d 451,454 (4th Cir. 1996). Pet. App. 4a-5a. There is no good reason to review or to disturb that decision.

ARGUMENT

A. There Is No Conflict Between the Circuit Court's Decision and Decisions By This Court.

Petitioner seeks to create a conflict between the Circuit Court's decision and this Court's holding in College Point Boat Corp. v. United States, 267 U.S. 12 (1925). This is unavailing, for the two decisions are perfectly consistent.

The doctrine of constructive termination for convenience is a proposition of government contracts law which has been developed and applied by the Federal Circuit Court of Appeals beginning in 1963 with its decision in John Reiner & Company v. United States, 325 F. 2d 438 (Ct. Cl. 1963), cert. denied, 377 U.S. 931 (1964). The doctrine, as

developed by the Federal Circuit, holds that any breach or other termination of a contract by the government will entitle the contractor to only those damages available under the contract's termination for convenience clause. It serves an explicit policy. The doctrine operates as a form of liquidated damages agreement under which the government's liability is limited to reimbursement of the contractor's expenses and earned profits but does not extend to expectancy damages. The Federal Circuit was explicit as to this policy in its decision in Nolan Brothers Incorporated v. United States, 405 F. 2d 1250 (Ct. Cl. 1969), where it said:

> This cannot be the result, Plaintiff says, where the government has breached the contract -- it cannot escape the normal common law consequences of its wrongful action by terminating the contract for its own convenience. The answer, we think, is that the convenience article was precisely intended to allow the government to avoid the consequence that it pay unearned profits.

405 F. 2d at 1254 (Citations omitted).

In support of that policy, the courts have held that the constructive termination for convenience doctrine converts any contractor breach claim into a termination for convenience. The circumstances, extent of breach, type of breach or time of breach will not alter that result. The Court of Claims made the sweep of the doctrine perfectly clear in its decision in Kalvar Corporation v. United States, 543 F. 2d 1298, 1304-05 (Ct. Cl. 1976):

> In the absence of bad faith or clear abuse of discretion, the effect of the constructive termination for convenience doctrine is to moot all breach claims and to limit recovery to costs which would have been allowed had the contracting officer actually invoked the [termination for convenience] clause. Thus ... we need not consider the merits of any claim for breach of contract here.

(citations omitted).

Hancock's arguments to the court of appeals and to this Court contradict the holding in Kalvar and thus misrepresent the law. Hancock pleads that because WMATA's alleged breach of contract consisted of a demand for an additional performance, as opposed to a lesser one, the type or circumstances of that particular breach of contract ought to constitute an exception to the constructive termination for convenience doctrine. Pet. 10. No case recognizes or suggests such an exception. From the point of view of the policy underlying the doctrine, the exception suggested by Hancock makes no sense. The Court of Claims stated in Nolan Brothers that the purpose of the doctrine of constructive termination for convenience is to disallow expectancy damages in the event of a government breach of contract. Why, then, should the government not be liable for expectancy damages if it breaches the contract by demanding a lesser performance but, if it breaches the same contract by demanding a greater performance, pay the contractor's lost profits? To fulfill the underlying policy, the

doctrine must, of course, be applied in both such instances and that is, in fact, the law.

The Kalvar Court noted no pertinent exception to the sweep of the doctrine of constructive termination for convenience. None exists. In this respect, Hancock misconstrues this Court's decision in United States v. Utah Construction & Mining Co., 384 U.S. 394 (1966), asserting that cardinal changes to a government contract are actionable in court. Pet. 5. Utah Construction addressed neither the doctrine of constructive termination for convenience nor the issue of cardinal changes to government contracts. It has no direct relevance to the dispute between these parties. In Utah Construction, this Court was asked to rule on the proper forum for resolution of disputes arising under a contract signed in 1955. Because the contract was completed, the termination for convenience doctrine was not at issue. Indeed, the decision does not mention whether the contract even contained such a clause. The claim of a "cardinal change" to the contract is nowhere addressed in the decision.

Moreover, even if one assumes, arguendo, the application of Utah Construction to the facts of this case, Hancock's cause does not prosper. In Utah Construction, the contractor, after completing the construction project, sought recovery of additional costs incurred, he argued, because of breaches of contract by the government. This Court allowed the contractor to pursue a breach of contract action for those claims because, inter alia, the types of breach alleged were not administratively redressable under the terms of the contract in question. See, 384 U.S., at 404-405. If, as

Hancock argues, delivery of software documentation was outside of the Changes clause in the parties' contract, Utah Construction would, at best, lend support to a breach claim for the extra costs incurred in providing that material. But Hancock's claim is not for the additional costs imposed by WMATA's alleged breach. Hancock claims that the entire contract was terminated. Pet. 4. Accepting that claim at face value, the Termination for Convenience Clause of the parties' contract specifies an administrative remedy for that termination. Because Hancock's claim is redressable under remedies provided in its contract, dismissal of its claim was entirely consistent with Utah Construction.

Additionally, Hancock misreads this Court's decision in College Point Boat Corp. v. United States, 267 U.S. 12 (1925), envisaging a conflict between that holding and the one rendered by the court of appeals it its case. Pet. 8. College Point Boat Corp. is the foundation upon which the doctrine of constructive termination for convenience rests. See, e.g., Reiner, Supra, at p. 443. It held that an unconditional right to cancel an agreement can be asserted as a defense against expectancy damages even if that right was not exercised at the time of breach. The Court stated that, "This continuing right of cancellation, which was asserted later, in court, operated to curtail the damages recoverable. It limited the value of the plaintiff's right to acquire performance, and hence the amount and character of the loss for which compensation must be made." College Point Boat Corp. v. United States, 267 U.S. 12,16 (1925). Decisions rendered by the Fourth Circuit in this case and by this Court in College Point Boat Corp. reach the same result for the same reasons. In both instances the contractor/

plaintiff's recovery for an alleged breach of contract by the government was held not to include expectancy damages because of the unconditional, contractual right of the government to cancel that contract. The two decisions are entirely congruent in logic and outcome.

The constructive termination for convenience doctrine, which was properly applied in this case, has been settled law for decades. Its intended effect, to limit a contractor's recovery to quantum meruit damages, has been consistently applied by courts, principally the Federal Circuit Court of Appeals, since the Reiner and Kalvar family of decisions in the 1960s. That doctrine also supports the important policy of having complex government contract disputes determined by the specialized administrative tribunals created for that purpose rather than by courts of general jurisdiction. The preference for administrative determination of such disputes is very strong. See, e.g., Moses H. Cone Memorial Hospital v. Mercury Construction Co., 460 U.S. 1, 24-25 (1983) and United States v. Anthony Grace & Sons Inc., 384 U.S. 424 (1966). In this case, Hancock had and continues to have the clear option of filing a claim before the contractually-specified administrative tribunal. It opted not to do so in order to pursue a greater allowable recovery, e.g., its expectancy damages, in the district court. Given the strength, age and comprehensive scope of the law limiting contractor's recoveries and the powerful judicial policies in preference of initial, administrative, determination of government contract disputes, Hancock's decision was bound to prove unwise. The Court of Appeals correctly applied the law concerning the doctrine of constructive termination for convenience.

B. Other Issues Proposed By Petitioner Should Not Be Reviewed.

Hancock complains that the Court of Appeals decided an issue that Hancock had posed in its Complaint and which had been briefed by both parties to the District Court and the Court of Appeals, e.g., whether WMATA's requirement for software documentation constituted a "cardinal change" to the parties' contract. Pet. 11-14. Hancock worries that, "The Court's ruling on this issue, therefor, effectively put [sic] Hancock out of court and likely out of business." Pet. 12.

The Court's discussion of the cardinal change issue does no such thing. The Fourth Circuit carefully refrained from expressing an opinion on the underlying merits of the parties' dispute as to whether the contract did, or did not, require Hancock to provide the software documentation: "In so doing, we express no view on the merits of the parties' underlying dispute." Hancock Electronics Corp. v. WMATA, 81 F. 3d 451,455 (4th Cir. 1996). Pet. App. 6a. Moreover, Hancock will have a full opportunity to defend its interests in any subsequent proceeding concerning termination of its contract. See, D. Moody & Co., Inc. v. United States, 5 Cl. Ct. 70 (1984).

The Court's discussion of the cardinal change issue addresses a threshold question of law which was extensively briefed by both parties. Hancock sought to avoid administrative resolution of its cause by arguing that WMATA's demands for software documentation constituted a " cardinal

change" to the contract. Pet. App. 5a. In government contract law, a " cardinal change " is a type of performance so profoundly different, in scope or in kind, from the original terms of the contract, that it is fairly characterized as beyond the scope of that original contract. See, e.g., Allied Materials & Equip. Co., v. United States, 569 F. 2d 562, 563-564 (Ct. Cl. 1978) (per curiam). Imposition of a "cardinal change" amounts to a breach of contract by the government. Id. Hancock had argued, unsuccessfully, that breach of a contract via a "cardinal change" was an exception to the Kalvar court's teaching that all breaches of contract were converted to terminations for convenience under applicable law.

Whether, on the facts alleged in the Complaint, Hancock had made out a case of "cardinal change" is a question of law, properly decided by motion. The Complaint, as the Fourth Circuit accurately noted, states that Hancock had completed its work on the braking system software, had brought the software documentation requested by WMATA to Washington and was ready to install its braking equipment, running on that software, on rail cars for qualification testing. App. 8. The Complaint thus affirms that all software documentation necessary to operation of the braking systems was complete and in hand. If Hancock had, as it claimed in the Complaint, composed all software necessary to operate the braking systems, then it necessarily had to have composed all levels of that software, e.g., from the english-like general instructions to the machine-readable binary programming. By way of analogy, if an author claims that her book is ready to publish, she is impliedly claiming that all component parts of the book, e.g., chapters,

paragraphs, sentences, words and characters, are complete as well. Thus, the Fourth Circuit's statement that, "[N]o one claims that Hancock had to perform extra work or develop new information to comply with WMATA's request," is both perfectly correct and apparent from the face of the Complaint. Pet. App. 6a.

Hancock did not, on the face of its Complaint, allege facts which, if true, would constitute a "cardinal change" type breach of its contract. The Fourth Circuit correctly noted that, as a matter of law, the additional performance alleged in Hancock's Complaint was not so profoundly different from the performance specified in the parties' contract as to amount, in law, to a "cardinal change" to that contract. Pet. App. 5a-6a.

CONCLUSION

The petition for writ of certiorari should be denied. The doctrine of constructive termination for convenience, properly applied in this instance by the Circuit Court, has been a settled feature of government contracts law for at least twenty years. Petitioner has presented no worthwhile reason to engraft a special exception to that doctrine.

Hancock's approach to its contract dispute was a studied, though very risky, attempt to overcome strong legal precedent in pursuit of greater damages. Hancock could have had its complaints adjudicated by the contractually-specified administrative tribunal. Had it done so, however, its potential recovery would have been limited to the quantum meruit damages specified in the contract's "Termination

for Convenience" clause. Instead, it chose to pursue a greater recovery of expectancy damages in the federal district court. That strategy transgressed at least two bedrock principles of government contracts law. Government contracts disputes should be heard, in the first instance, by the specialized administrative tribunals established for that purpose, not by the courts. Second, government liability in contract is limited, by contract, to the damages calculated under the termination for convenience clause. The decisions of the District Court and Court of Appeals are, accordingly, completely consistent with established law.

Respectfully submitted,

Robert L. Polk
General Counsel

Carol B. O'Keeffe
Principal Deputy General Counsel
Counsel of Record

Joseph J. Zimmerman
Assistant General Counsel

Washington Metropolitan Area Transit Authority
600 Fifth Street, NW
Washington, DC 20001
(202) 962-2531

Supreme Court, U.S.
FILED
SEP 24 1996

(3)

No. 96-230

IN THE

Supreme Court Of The United States

OCTOBER TERM 1996

HANCOCK ELECTRONICS CORPORATION,

Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Thomas B. Smith
Counsel of Record
ROPES & GRAY
1301 K Street, N.W.
Suite 800 East
Washington, D.C. 20005
(202) 626-3900

Attorneys for Petitioner

Balmar Legal Publishing Department, Washington, D.C. (202) 682-9800

6 pp

No. 96-230

IN THE

Supreme Court Of The United States

OCTOBER TERM 1996

HANCOCK ELECTRONICS CORPORATION,

Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

1. WMATA makes numerous allegations in its Statement of Facts that are irrelevant to the issues in this case, unsupported by any record evidence, and inappropriate in the context of a motion to dismiss. Among them are the claims that "safety testing for computer programming is performed by what is know[n] as a Failure Modes and Effects Analysis ("FMEA") test," Opp. 3, and that "WMATA needed to have FMEA tests performed on Hancock's braking system software." *Id.*

These assertions should be ignored by the Court. Instead, on a motion to dismiss, the relevant points are the ones alleged in the complaint: (1) A FMEA was not required, contemplated, or mentioned in the contract between Hancock and WMATA, (2) Hancock was excluded from a subsequent contract between WMATA and a third party, Battelle Corporation ("Battelle"), to perform a FMEA on Hancock's brakes, (3) WMATA was warned that by excluding Hancock from the FMEA contract, WMATA would not have access to Hancock's proprietary data to perform the FMEA, and (4) WMATA's attempt to get that data from Hancock by ruse and deception was a material breach of, and cardinal change to, Hancock's contract. App. 6-10. *See also* Pet. App. 7a-8a (according to district court, if WMATA wanted Hancock's data for the FMEA, it should have so provided in Hancock's contract).

2. WMATA argues that the doctrine of constructive termination for convenience applies to "any breach of contract by the government." Opp. 2, 9. Accepting this argument would completely undermine the bedrock government contracts doctrine of "cardinal change."

Under government contracts such as the one at issue here, the government may unilaterally order changes in the contractor's performance as long as those changes are within the general scope of the contract. Any additional costs imposed on the contractor are to be negotiated using procedures set forth in the disputes clause of the contract. Yet any changes ordered by the government that are *not* within the scope of the contract, and which fundamentally alter the nature of the contractor's undertaking, *cannot* be resolved using the disputes clause procedures. In those cases, and this one too, the contractor's remedy is to suspend his performance under the contract and sue in court. *Rohr Industries, Inc. v. WMATA*, 720 F.2d 1319, 1322-23 (D.C. Cir. 1983). These principles are universally recognized. *See United States v. Utah Construction and Mining Co.*, 384 U.S. 394, 412

(1966); *In re Boston Shipyard Corp.*, 886 F.2d 451, 456-57 (1st Cir. 1989); *Ginsberg v. United States*, 707 F.2d 91, 93 n.1 (4th Cir. 1983); *Bethlehem Steel Corp. v. Grace Line, Inc.*, 416 F.2d 1096, 1101 (D.C. Cir. 1969); *Crown Coat Front Co. v. United States*, 395 F.2d 160, 161 (2d Cir.), *cert. denied*, 393 U.S. 853 (1968).[1]

Where the government orders a cardinal change, the contractor refuses to comply, and instead sues on the contract, the doctrine of constructive termination for convenience cannot be invoked by the government to avoid the consequences of its breach. If the government does not attempt to terminate the contract at all, it cannot later argue that such a termination was really for the convenience of the government. *See, e.g., College Point Boat Corp. v. United States*, 267 U.S. 12, 15-16 (1925); *Maxima Corp. v. United States*, 847 F.2d 1549, 1553 (Fed. Cir. 1988); *Torncello v. United States*, 681 F.2d 756, 759 (Ct. Cl. 1982); *Sanders Associates, Inc. v. United States*, 423 F.2d 291, 295-96 (Ct. Cl. 1970); *G.C. Casebolt Co. v. United States*, 421 F.2d 710, 712 (Ct. Cl. 1970). The question here is not, as WMATA argues, whether an "exception" to the doctrine of constructive termination for convenience applies to cases involving cardinal change. Opp. 10-11. The doctrine does not apply at all absent action by the government to terminate the contractor's performance.

Once the contractor has sued on the contract, moreover, there is no longer any contract for the government to terminate, expressly or constructively, for convenience or otherwise. *See, e.g., Northern Helex Co. v. United States*, 524 F.2d 707, 715-16 (Ct. Cl. 1975), *cert. denied*, 429 U.S. 866 (1976); *William Green Construction Co. v. United States*, 477 F.2d

---

[1] Contrary to WMATA's argument, Opp. 11, termination for convenience provisions are included in virtually every government contract today, either expressly or implicitly as a matter of law. *See G.L. Christian & Associates v. United States*, 312 F.2d 418, 424-27 (Ct. Cl.), *cert. denied*, 375 U.S. 954 (1963).

930, 936 (Ct. Cl. 1973), *cert. denied*, 417 U.S. 909 (1974). Any *post hoc* attempt to argue that the contract had actually been terminated by the government is therefore insufficient to deprive the contractor of the breach remedy. *See generally* C. Vacketta & T. Wheeler, *A Government Contractor's Right To Abandon Performance*, 65 Geo. L.J. 27, 46-47 (1976).[2]

3. WMATA argues that the court of appeals was correct in ruling on the issue of cardinal change on WMATA's motion to dismiss because Hancock's complaint "affirms that all software documentation necessary to operation of the braking systems was complete and in hand" at the time the qualification tests were to have been performed. Opp. 15. The argument fails because it misperceives the doctrine of cardinal change, in which the *nature and quality* of the changes ordered, not merely the amount of extra effort involved, determines whether a change is within or outside the scope of a contract. *See, e.g., In re Boston Shipyard Corp.*, 886 F.2d at 456-57; *Edward A. Marden Corp. v. United States*, 442 F.2d 364, 369 (Ct. Cl. 1971). The Fourth Circuit too ignored this critical distinction. Pet. App. 5a-6a.

The argument also fails because it mischaracterizes Hancock's complaint. As made clear there, the claim in this case does *not* arise out of a simple request by WMATA to review the proprietary data that Hancock had brought with it to the qualification tests, so WMATA could evaluate the operation of Hancock's brakes at that time. It arises out of WMATA's demand that Hancock surrender that data to WMATA for other unspecified -- and unlimited -- purposes, which were later revealed to include disclosure to Battelle so it could perform a FMEA on Hancock's brakes. App. 8-10. Hancock's

---

[2] WMATA incorrectly states that it notified Hancock that its contract was being terminated for default on May 15, 1995, four days after Hancock stopped its performance on the contract and sued WMATA in federal court. Opp. 5. In fact, WMATA did not inform Hancock of its purported "default" until June 16, 1995. Supp. App. 52-53.

claim also arises out of WMATA's demand that, if Battelle wanted more proprietary data from Hancock for the FMEA, Hancock would have to generate it, and then give it up too. App. 9-10; *see also* Supp. App. 65-66.

As the district court found in its original ruling, these allegations were sufficient to state a claim of cardinal change, and Hancock should have been permitted the federal forum to fully develop facts to support it. Pet. App. 8a.

CONCLUSION

For all the foregoing reasons, Hancock Electronics Corporation respectfully requests that its Petition for Writ of Certiorari be granted.

Respectfully submitted,

Thomas B. Smith
Counsel of Record
ROPES & GRAY
1301 K Street, N.W.
Suite 800 East
Washington, D.C. 20005
(202) 626-3900

Attorneys for Petitioner

Dated: September 23, 1996